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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. **73-846**

JOHN W. WINGO, WARDEN
KENTUCKY STATE REFORMATORY
LaGRANGE, KENTUCKY PETITIONER

vs.

CARL JAMES WEDDING RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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RESPONSE NOT PRINTED

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner, John W. Wingo, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided August 31, 1973.

OPINION BELOW

The judgment and order of the United States Court for the Sixth Circuit is reported as *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on August 31, 1973. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE FEDERAL MAGISTRATES ACT, 28 U.S.C. § 631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. § 2241 ET SEQ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes which are involved here are: 28 U.S.C. § 2241, et seq., which is the statutory codification of Federal habeas corpus; and 28 U.S.C. § 631, et seq., which is the Federal Magistrates Act, and particularly 28 U.S.C. § 636 (b).

The provision of the constitutional provision involved is Article III of the United States Constitution which vests the judicial power of the United States.

STATEMENT OF THE CASE

Respondent is presently serving a life sentence imposed in 1949 by the Webster Circuit Court, Com-

monwealth of Kentucky, after entry of a plea of guilty to murder.

Pursuant to Kentucky Criminal Rule 11.42, the respondent, in 1970, filed a motion to vacate this sentence in the Webster Circuit Court which was denied without a hearing. That order was affirmed by the Kentucky Court of Appeals, *Wedding v. Commonwealth*, Ky., 468 S.W.2d 273 (1971).

Thereafter, the respondent, pro se, filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to provisions contained in 28 U.S.C. § 2241, et seq. The District Court entered an order dismissing the petition. The respondent appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the lower court and remanded the matter to the District Court for the holding of an evidentiary hearing.

Pursuant to Rule 16 (c)(3), Rules of the United States District Court for the Western District of Kentucky, the District Court assigned the matter of the evidentiary hearing to the United States Magistrate. Prior to the holding of the evidentiary hearing the respondent moved to disqualify the Magistrate from holding such hearing on the grounds that the Magistrate was not empowered to hold evidentiary hearings under authority of the Federal Magistrates Act, 28 U.S.C. § 631, et seq. That motion was overruled by the District Court.

An evidentiary hearing was held on June 26, 1972 before the United States Magistrate, sitting specially at Dixon, Webster County, Kentucky. Thereafter, the Magistrate provided the District Court with his Findings of Fact and Conclusions of Law, recommending that respondent's petition be dismissed. Respondent, under Rule 16(c)(3) of the Rules of the United States District Court for the Western District of Kentucky, requested that the District Court consider the matter *de novo*. Thereafter, the District Court entered an order dismissing respondent's petition for Writ of Habeas Corpus. Respondent appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit once again reversed the decision of the District Court by vacating the judgment of dismissal and remanded the case with instructions that the District Court itself hold an evidentiary hearing on respondent's constitutional claims. *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973). It is from this Order that a review is sought.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important question of federal law which has not been, but should be, decided by this Court:

Reason for this Court granting the Writ is set out in footnote three (3) of the Sixth Circuit's Opinion in the instant case, *Wedding v. Wingo*, *supra*, at page 1137:

"3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. *Gonzalez v. Zelker*, 477 F.2d 797 (2d Cir. 1973); *Johnson v. Wainwright*, 456 F.2d 1200 (5th Cir. 1972); *Parnell v. Wainwright*, 464 F.2d 735 (5th Cir. 1972); *United States v. King*, 455 F.2d 435 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no question as to the legality of reference was raised or passed upon by the Courts."

The Sixth Circuit has decided that the Federal Magistrates Act, 28 U.S.C. § 631 et seq., does not empower United States Magistrates to conduct evidentiary hearings on federal habeas corpus petitions.

Thus, there is present a conflict between the Circuit Courts of Appeal. The Sixth Circuit, by decision, has held that Magistrates cannot conduct evidentiary hearings on federal habeas corpus petitions. The First, Second, and Fifth Circuits, by practice, have held that Magistrates can conduct such hearings.

It is necessary that this conflict be settled by this Court in order that there might be uniformity of practice and decisions in the Federal Courts as to Whether a Magistrate is empowered to conduct evidentiary hearings on habeas corpus petitions by the Federal Magistrates Act, 28 U.S.C. § 631 et seq.

Petitioner submits that the United States Magistrates are empowered to hold evidentiary hearings on federal habeas corpus petitions. Authority for this

can be found in the Federal Magistrates Act, 28 U.S.C. § 636 (b), which states:

“(b) Any district court of the United States, by the concurrence of a majority of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to —

“(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

“(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

“(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.” (Emphasis added.)

This section authorizes the district court to establish rules from which United States Magistrates may be assigned additional duties as long as these duties are not inconsistent with the Constitution and

the laws of the United States. The section (28 U.S.C. § 636(b)) then provides: ". . . additional duties authorized by rule *may include, but are not restricted to.*"

By inserting this provision, Congress made this section purposely broad to enable the United States District Courts to effectively utilize the Magistrates by assigning them additional duties so long as these duties were consistent with the Constitution and the laws of the United States.

In *TPO, Incorporated v. McMillen*, 460 F.2d 348 (7th Cir. 1972), the Seventh Circuit, in discussing the legislative history of the Federal Magistrates Act, quoted from one of the Senate Hearings on the Act when it stated at pages 355 and 356:

"The subcommittee staff also prepared a memorandum dated April 28, 1966, which accompanied the preliminary draft and commented on 'new functions' as follows:

" 'The bill authorizes the district courts to assign full-time magistrates such additional duties *as are consistent with their non-Article III status* (subcommittee emphasis). The provision lists *by way of suggestion rather than requirement* (emphasis ours), the following: supervision of pretrial discovery proceedings in both civil and criminal cases; the holding of pretrial hearings; preliminary review of petitions for post-conviction relief; assignments to act as special masters in appropriate civil cases.' "

[footnote omitted]

Petitioner submits that the three additional duties which Congress set forth in 28 U.S.C. § 636(b) were

suggested duties, not required duties. For this reason, these suggested additional duties cannot be reasonably interpreted to be "exclusive on the topics which they cover" as the Sixth Circuit held them to be. *Wedding v. Wingo*, *supra* at page 1135.

On June 16, 1972, all the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c)(3) as follows:

"O R D E R"

"The order entered May 1, 1972, amending by adding to paragraph (c)(3) of Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby rescinded.

"Effective immediately, Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby amended by adding to paragraph (c)(3) as follows:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to

the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration.'

"Date: June 16, 1972

"/s/ James F. Gordon

James F. Gordon, Chief Judge
United States District Court

"/s/ Rhodes Bratcher, Judge

Rhodes Bratcher, Judge
United States District Court

"/s/ Charles M. Allen

Charles M. Allen, Judge
United States District Court

"/s/ Mac Swinford

Mac Swinford, Judge
United States District Court"

"ENTERED June 16, 1972"

Thus, pursuant to 28 U.S.C. § 636(b), the district court judges of the Western District of Kentucky established a rule in which the United States Magistrate

of that district was assigned the additional duty of scheduling and hearing evidentiary matters which he deemed necessary to the determination of the merits of petitions for habeas corpus from state prisoners. At such evidentiary hearing, the United States Magistrate was to record the testimony on electronic sound recording equipment and then make *proposed* findings of facts and conclusions of law to the proper judge for his consideration. These would then be expeditiously given to the judge, along with the transcript of the proceedings and the sound recording of the testimony, for his independent consideration and ultimate determination of the state prisoner's petition.

If, upon written request of either party, filed within ten days from the date such is transmitted to the proper District Judge, that judge shall hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration.

The new amendment to Rule 16 added to paragraph (c)(3) is the procedure which was followed in the instant case and was the basis of the respondent's objection in his Sixth Circuit appeal.

In *Holiday v. Johnston*, 313 U.S. 342, 61 S.Ct. 1015, 85 L.ed 1392 (1941), this Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions.

In *Payne v. Wingo*, 442 F.2d 1192 (6th Cir. 1971), the Sixth Circuit held that there was "no authority for the delegation of the conduct of a habeas corpus evidentiary hearing to a Special Master."

In *Holiday*, supra, the hearing was conducted by a United States Commissioner and *Payne*, supra, by a United States Commissioner appointed as a Special Master. Neither case involved a hearing conducted by a United States Magistrate.

Holiday, supra, 313 U.S. at 352, which was decided before enactment of the 1968 *Federal Magistrates Act*, stated:

"One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts. 313 U.S. at 352. . . ."

In *Payne*, supra, the Sixth Circuit decided that the *Holiday* doctrine was applicable to the new statutory scheme and stated that there was no authority for a Special Master to conduct an evidentiary hearing and that the court, rather than a commissioner or special master, should "hear and determine the facts and dispose of the matter as law and justice require."

In the instant case, the oral testimony of the petitioner and the other witness at the evidentiary hearing was weighed and appraised by the district judge himself through his de novo consideration of the sound recording of the testimony. For this reason, we submit that this case substantially meets the standards set out by this

Court in *Holiday*, supra, and the Sixth Circuit in *Payne*, supra.

The 1968 *Federal Magistrates Act* was passed in order to upgrade the then existing United States' commissioner system. In *TPO, Incorporated v. McMillen*, supra, there is an excellent discussion of the legislative history of the magistrates act.

As a result of the passage of the Federal Magistrates Act, the title of the office was changed from United States Commissioner to United States Magistrate. All magistrates were required to be attorneys unless it was impossible to find a qualified attorney. Magistrates were paid fixed salaries rather than on a fee system. Full time magistrates were given secure eight-year terms, subject to removal only for cause. See *TPO, Incorporated*, supra, at page 351.

Argument has been made that magistrates cannot hold evidentiary hearings because they do not fall within Article III of the Federal Constitution which vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and that due process of law encompasses the right of litigants to have cases or controversies determined by Article III judges. See *TPO, Incorporated*, supra, at page 353.

Petitioner concedes that magistrates do not have authority to decide or to make ultimate determination of fact, cases or controversies. This must be left to the Article III courts, such as Federal District Courts.

However, petitioner submits that the purposely broad

language that Congress set out in the *Federal Magistrates Act* authorizes the federal courts to establish rules assigning duties to the magistrate to conduct evidentiary hearings and to submit *proposed* findings of fact and conclusions of law and his recommendation thereon. In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it de novo consideration as the habeas corpus petitioner, in this case, requested.

The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate.

For the foregoing reasons, respondent submits that the *Federal Magistrates Act*, 28 U.S.C. § 631, et seq., empowers a United States Magistrate to hold evidentiary hearings involving relief under 28 U.S.C. § 2241, et seq.

CONCLUSION

The Sixth Circuit has held that Magistrates cannot conduct evidentiary hearings on federal habeas corpus petitions. The First, Second, and Fifth Circuits, by practice, have held that Magistrates can conduct such hearings.

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit to settle this conflict between the Circuit Courts in order that there might be uniformity of practice and deci-

sion in the Federal Courts as to whether a Magistrate is empowered to conduct evidentiary hearings on habeas corpus petitions by the Federal Magistrates Act, 28 U.S.C. § 631, et seq.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Ed W. Hancock, one of counsel for petitioner, hereby certify that the foregoing Petition was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on November 23rd, addressed to counsel for respondent, Honorable Joseph G. Glass, 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202.

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COUNSEL FOR PETITIONER.

APPENDIX

APPENDIX

APPENDIX A

No. 72-2160

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING, ... Petitioner-Appellant,

V.

JOHN W. WINGO, Respondent-Appellee.

APPEAL from United States District Court
for the Western District of Kentucky.

Decided and Filed August 31, 1973.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Circuit Judge. Wedding appeals from the denial by the District Court of his petition for a writ of habeas corpus after an evidentiary hearing conducted by a United States Magistrate. Wedding is presently serving a life sentence imposed in 1949 by the Webster Circuit Court of Kentucky after a plea of guilty to a

charge of murder. He had filed his petition for the writ in the District Court in 1971, alleging among other things that his counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

Wedding's petition was denied without a hearing. He appealed to this Court and we reversed and remanded with instructions to conduct an evidentiary hearing on the petitioner's claims of constitutional violation 456 F.2d 245 (6th Cir. 1972).

Upon remand, a United States Magistrate, acting pursuant to a rule adopted by the District Court, issued an order assigning the evidentiary hearing to himself. Prior to this hearing, however, the petitioner moved to disqualify the Magistrate from holding such hearing on the ground that a Magistrate was not authorized and empowered under authority of the Federal Magistrates Act of 1968 (28 U.S.C. §§ 631 to 639 (1973 supp.)) to hold evidentiary hearings. That motion was overruled by the District Court.

The evidentiary hearing was then conducted by Magistrate on June 26, 1972, at which time an electronic recording was made of the testimony of the witnesses. Thereafter the Magistrate adopted findings of fact and conclusions of law, in writing, ruling that no constitution right of petitioner had been violated, and recommending that the petition be dismissed. The Magistrate submitted to the Court his findings and conclu-

sions, together with a recording (a plastic phonograph record) of the proceedings.

The petitioner moved to have the Court give the matter *de novo* consideration. The Court listened to the recording and adopted the findings of fact and conclusions of law of the Magistrate as his own, and dismissed the petition as without merit.

The petitioner has again appealed to this Court, contending that the proceedings of the District Court were invalid because the United States Magistrate had no authority under the Act to conduct an evidentiary hearing on his habeas corpus petition. We agree.

The Federal Magistrates Act of 1968, 28 U.S.C. §§ 631 to 639 (1973 Supp.) provides in relevant part:

“ . . .

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to —

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." (28 U.S.C. §636 (1973 Supp.))

Pursuant to this statute, the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c)(3) the following:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party,

filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony, to the proper Discretionary hearing and give it de novo consideration."

The interpretation by the rule which the Western District of Kentucky has placed upon the congressional grant of power to United States Magistrates is, in our opinion, incorrect.¹ The Act granted authority to the Magistrate to conduct only a preliminary review of applications for post-trial relief in order to facilitate the decision of the District Court as to whether there should be a hearing. This Court, in its mandate, had already directed that an evidentiary hearing be conducted. This rule of the District Court, quoted above, attempts to expand the jurisdiction of the Magistrate and, as will be pointed out, conflicts with the Act, and is therefore invalid.

Our analysis begins with *Holiday v. Johnston*, 313 U.S. 342 (1941), wherein the Court assessed the respondent's claim that a United States Commissioner (the predecessor of the United States Magistrate) could conduct evidentiary hearings for habeas corpus by

1. Because the Magistrates Act of 1968 cannot be interpreted to permit the procedure adopted by the Western District of Kentucky, we need not decide whether it would be permissible constitutionally for Congress to invest power to hold habeas corpus hearings in an official who is outside the pale of Article III of the Constitution. See, however, *TPO, Inc. v. McMillen*, 460 F.2d 348, 352-354 (7th Cir. 1972).

virtue of Rule 53(a) and (b) of the Rules of Civil Procedure.

The Court stated:

"It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal compliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district courts in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53(a)(b) of the Rules of Civil Procedure.

"We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the de-

termination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." (313 U.S. at 351-352).

By virtue of *Holiday*, the conduct of habeas corpus hearings by United States Commissioners became a dead issue.

Subsequently, however, Congress modified the habeas corpus statute so to provide that "[t]he *court* shall summarily hear and determine the facts, and dispose of the matter as law and justice require", rather than "[t]he *court*, or *justice* or *judge*, shall proceed in a summary way to determine the facts of the case. . ." as was formerly provided. 28 U.S.C. § 2243 (1971). (Emphasis added.) The same judicial district involved in this case, the Western District of Kentucky, interpreted this modification of the habeas corpus statute as a new authorization by Congress to have officers other than United States Judges, hold habeas corpus evidentiary hearings.

In *Payne v. Wingo*, 442 F.2d 1192 (6th Cir. 1971), we squarely rejected this interpretation. We stated therein:

"When Congress retained the reference to the 'court' in the new statute, it must have meant to

retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of *Holiday* by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

...

"We realize that our decision in this case does not help alleviate the tremendous and increasing burden which the expanding number of habeas corpus petitions places on United States District Judges. Nevertheless, we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a clear mandate from Congress, we cannot presume, that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary." (Footnotes omitted) (422 F.2d at 1194-1195).

It is within this context that the interpretation placed upon 28 U.S.C. § 636(b) (1973 Supp.) by the Western District of Kentucky must be analyzed.

The respondent implicitly concedes that authorization for Magistrates to hold evidentiary hearings on habeas corpus petitions is not found in subpart (3) of 28 U.S.C. § 363(b) (1973 Supp.) That section clearly limits the duties of a Magistrate to a review of habeas corpus applications "to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" (Emphasis added.) 28 U.S.C. § 636 (b)(3) (1973 Supp.) Respondent's construction

actually conflicts with the plain language of this subsection.

However, respondent relies upon language immediately preceding subpart (3) of Section 636(b) for authorization of evidentiary hearings by Magistrates. In introducing the explicitly granted powers of United States Magistrates, Congress stated:

"The additional duties authorized by rule [of a judicial district] include, *but are not limited to* —" (Emphasis added) 28 U.S.C. § 636(b) (1973 Supp.).

From this language respondent deduces that Congress invested in extra-judicial officials trial powers which it had for so many years withheld. The inaccuracy of this deduction is manifest.

If Congress intended such a sweeping and far-reaching result certainly it would have indicated this clearly and positively within the body of the Magistrates Act of 1968. Cf., *Buckeye Power, Inc. v. Environmental Protection Agency*, ____ F:2d ____ (6th Cir. No. 72-1628, June 28, 1973) Slip Opinion at 9.

More important, such an interpretation runs directly counter to the well-established doctrine of statutory construction denominated *ejusdem generis*. This doctrine directs that a general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope. The Supreme Court in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957), articulated the rule as follows:

"[T]he law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208.' *MacEvoy Co. v. United States*, 322 U.S. 102, 107."

Therefore, although the Magistrates Act of 1968 provides that Magistrates are [not restricted to] the three powers explicitly outlined in the Act, by virtue of *ejusdem generis* those three powers are exclusive on the topics which they cover. Accordingly, insofar as habeas corpus is concerned, Magistrates have only the power to assist the District Judge in determining "whether there should be a hearing." 28 U.S.C. § 636(b)(3) (1973 Supp.).

The legislative history of Section 636(b) of 28 U.S.C. supports this proposition. The original draft of the subsection in the Senate Bill provided that the Magistrate could give:

" . . .

(3) preliminary consideration of application for post-trial relief made by individuals convicted of criminal offenses."

The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):

"The Committee is of the opinion that the enumeration of duties in Section 636(b) as now

worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack . . .” (Hearings on S.3475 before the Subcommittee on the Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241n.)

In order to foreclose a broad interpretation of Section 636 (b)(3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, “preliminary consideration of applications for post-trial relief” in the Bill was narrowed to “preliminary review” of the applications and the power and authority of the Magistrate was restricted to “submission of a report and recommendations to facilitate the decision of the district judge” only as to “whether there should be a hearing.” It was in this amended and narrowed form that the Act was passed by Congress.

Contemplating the possibility that this Court might reject its argument that a Magistrate has the power to conduct evidentiary hearings for habeas corpus, the respondent advances a second, alternative argument in support of the proceedings below. In its brief, respondent states:

“In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it de novo consideration as the petitioner, in this case, requested.

“The Federal Judge in this case made an independent determination and accepted the pro-

posed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate."

To the extent that the respondent argues that the petitioner was given an evidentiary hearing "before a district judge" because he (the Judge) thereafter listened to a sound recording of the hearing before the Magistrate, we are not persuaded.² With equal propriety it could be argued that any civil case could be heard by a Magistrate and the Judge could later decide the case by listening to the sound recording. The Magistrate would indeed become as Assistant Judge.

Rule 52(a) of the Federal Rule of Civil Procedure provides that a District Judge, sitting without a jury, is to make findings of fact and that these findings are not to be set aside by an appellate court unless they are clearly erroneous. The principle which underlies this rule was expressed by the Supreme Court in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), as follows:

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who *see* and hear them." (Emphasis added).

Deference is given to the factual findings of a trial

2. It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

judge because he has seen and observed the *demeanor* of the witnesses, and their "[o]utward manner or comportment." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1956). Listening to a sound recording of the testimony of a witness does not permit a Judge to see and observe the demeanor of witnesses and make credibility determinations therefrom.

Furthermore, it must be noted that an essential ingredient of a hearing before a Judge without a jury is the opportunity afforded to the Judge for questioning of witnesses. By his questioning of witnesses the Judge can clarify matters of evidence which are unclear; he can rule on objections made by the parties; and in the interest of justice he can make sure that both parties have had a fair hearing. By seeing and hearing the witnesses he will be in a much better position to make credibility determinations. Needless to say, the District Judge in this case could not ask questions of the sound recording. In our opinion, Wedding had the right to have his case heard by an Article III Judge.

In sum, petitioner did not have a hearing before a District Judge, either in form or in substance, as we ordered in our mandate.

In regard to the entire posture of this case, a recent admonition of the Court should be borne in mind. In *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972), we stated:

"Crowded court calendars may be a problem in the United States District Court for Eastern District of Kentucky. Reference of cases to Magis-

trates, however, is not the proper solution of the problem. . . . [T]he problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review *by a court*." (Emphasis added). (471 F.2d at 1281).

We vacate the judgment of dismissal and remand the case with instructions that the Court itself hold an evidentiary hearing on petitioner's constitutional claims.³

In so doing, we are impelled to note that the phonographic record of the evidentiary hearing was made a part of the record to this Court, apparently in lieu of a transcript. Such procedure was unauthorized. It renders impossible a review by this Court of the record without listening to the sound recording, and it contravenes Rule 10 of the Federal Rules of Appellate Procedure and Rule 10 of this Court.

Vacated and remanded.

3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. *Gonzales v. Zlker*, — F.2d — (2d Cir. No. 72-1945, Apr. 17, 1973); *Johnson v. Wainwright*, 456 F.2d 1200 (5th Cir. 1972); *Parnell v. Wainwright*, 464 F.2d 735 (5th Cir. 1972); *United States v. King*, 455 F.2d 345 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no question as to the legality of reference was raised or passed upon by the Courts.